No. 590

In the Supreme Court of the United States

OCTOBER TERM, 1947

HARRIS KENNEDY, ET AL.

v.

SILAS MASON COMPANY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF HERCULES POWDER COMPANY, AS AMICUS CURIAE

J. R. L. JOHNSON, JR.
ROBERT A. FULWILER, JR.
Counsel
Delaware Trust Building
Wilmington, Delaware

TABLE OF CONTENTS

CITATIONS

CASES:

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 590

HARRIS KENNEDY, ET AL.

v.

SILAS MASON COMPANY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF HERCULES POWDER COMPANY, AS AMICUS CURIAE

By written consent of all parties to this case, Hercules Powder Company submits this brief on its behalf as amicus curiae.

PRELIMINARY STATEMENT

This is an action by Harris Kennedy and others against Silas Mason Company for overtime compensation and other relief under the Fair Labor Standards Act of 1938. The United States District Court for the Western District of Louisiana denied Respondent's motion for summary judgment, 68 F. Supp. 576, and on rehearing set aside such order and granted the motion, 70 F. Supp. 929. On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, 164 F. (2d) 1016.

The Respondent, Silas Mason Company, during the late war constructed and operated for the United States of America an ordnance plant at Shreveport, Louisiana,

known as Louisiana Ordnance Plant, under the terms and provisions of a cost-plus-a-fixed-fee contract with the United States of America. The Petitioners sue for overtime, penalties and attorneys' fees which they claim to be due from the Respondent under the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. Secs. 201-219, alleging they had been employed at that facility in interstate commerce and in the production of goods for commerce within the meaning of 29 U.S.C., Sec. 203.

During World War II, Hercules Powder Company operated Badger Ordnance Works, Baraboo, Wisconsin, Missouri Ordnance Works, Louisiana, Missouri, New River Ordnance Plant, Pulaski, Virginia, Sunflower Ordnance Works, Lawrence, Kansas, Radford Ordnance Works, Radford, Virginia and Volunteer Ordnance Works, Tyner, Tennessee, for the United States of America pursuant to cost-plus-a-fixed-fee contracts covering each Ordnance facility. These were all new Ordnance facilities constructed for the purpose of manufacturing or processing munitions of war for the Government. The contracts under which Hercules operated such Ordnance facilities are substantially identical with the contract under consideration in this case and the services performed by Hercules Powder Company at the facilities named above were similar in kind to the services rendered by the Respondent to the Government in the operation of Louisiana Ordnance Plant.

Since the termination of the operations of the reference Ordnance facilities, Hercules Powder Company has been made party defendant to 28 separate actions of various types under the Fair Labor Standards Act of 1938, in which actions a total liability of approximately $10,000,000 has been asserted against it. An accurate estimate of the potential exposure of Hercules Powder Company under the Fair Labor Standards Act resulting from the operation of Ordnance facilities under cost-plus-a-fixed-fee contracts cannot presently be made. While all costs and expenses including any final judgments which might be rendered in

the actions now pending are reimbursable to Hercules Powder Company by the United States of America under the terms of the operating contracts, it nevertheless appears that Hercules Powder Company has a substantial interest in the outcome of the instant case. Therefore, we deem it proper that this brief as amicus curiae be filed herein and we respectfully request the Court's consideration thereof.

SUMMARY OF ARGUMENT

It is the contention of Hercules Powder Company that the Petitioners in this case and all persons similarly situated were not covered by the provisions of the Fair Labor Standards Act of 1938 for the following reasons:

I. In order for the Petitioners to recover in this case, it is necessary that they establish that they were engaged in commerce or in the production of goods for commerce. The manufacture or other processing of munitions of war from Government-owned materials at Government-owned Ordnance facilities and the transportation of the same across state lines by the United States of America does not constitute commerce or the production of goods of commerce within the meaning of the Fair Labor Standards Act of 1938. Therefore the Petitioners are not within the coverage of the Act.

II. The contractors who operated Government-owned Ordnance facilities for the production of munitions of war pursuant to the terms of a cost-plus-a-fixed-fee contract with the United States of America were subject to the control and direction by the United States of America to the extent that they constituted an instrumentality of the United States. Therefore they enjoyed the express immunities of the sovereign from the regulatory provisions of the Fair Labor Standards Act.

III. The end products of the Government-owned Ordnance facilities operated by cost-plus-a-fixed-fee contractors

were munitions of war. These munitions of war were not goods as that term is defined by the Fair Labor Standards Act because the articles manufactured were not "subjects of commerce" and were in the actual physical possession and under the control of the ultimate consumer thereof, during all stages of manufacture. Therefore the Petitioners herein were not engaged in the production of goods for commerce.

ARGUMENT

I.

THE MANUFACTURE OF MUNITIONS OF WAR BY THE RESPONDENT WAS NOT COMMERCE

The acquisition, construction and operation of Louisiana Ordnance Plant was done pursuant to the Act of July 2, 1940, c. 508, 54 Stat. 712 (Public No. 703, 76th Congr.), 50 U.S.C. App. Sec. 1171. In enacting this law, Congress was acting pursuant to the war powers granted to it by the Constitution. The source and nature of those war powers have been summarized elsewhere. *Ex parte Quirin*, 317 U.S. 1, 26.

In enacting Public Law No. 703, Congress was not attempting to exercise any powers granted to it under the Commerce clause of the Constitution, but it was providing for the procurement of national-defense material, national-defense premises and national-defense utilities, which were later to become war material, war premises and war utilities.[1] In thus authorizing the Secretary of War to contract for the construction, operation and maintenance of military defense facilities, the Congress did not purport to engage the federal Government in any form of commercial activities within the meaning of the term "commerce" as used in the Constitution.

Admittedly, the term "commerce" as used in the Constitution must be, and has been, given a broad interpreta-

[1] Act of April 20, 1918, c. 59, as added November 30, 1940, c. 926, 54 Stat. 1220, 50 U.S.C. Secs. 101, 104.

tion, and the courts have been reluctant to define it in exact terms. But always there has been recognized an ample perimeter beyond which the term "commerce" does not extend. Certainly it does not cover all forms of human activity. A practical concept of commerce is the passing of merchandise from one state to another and from one person to another to be sold in competition with other goods in ordinary channels of trade for profit.

This Court has many times attempted to define the term "commerce." Commerce is transportation of commodities since a sale is the object of importation. *Brown* v. *Maryland*, 25 U.S. 419, 446. Commerce is dealing in commercial products. *Oklahoma* v. *Kansas Nat. Gas. Co.*, 221 U.S. 229, 256. Commerce is the purchase, sale or exchange of merchandise for the purposes of trade. *Welton* v. *Missouri*, 91 U.S. 275, 280. Commerce is commercial intercourse. Goods are things which are bought and sold. Articles or subjects of commerce are those things tangible or intangible which are communicated, transmitted or transported as a business, for pay, or for profit, and as concommittants of business transactions. *Associated Press* v. *N. L. R. B.*, 301 U.S. 103,128. Commerce suggests business dealings in articles of trade for profit, and this idea has never changed. In *Carter* v. *Carter Coal Company*, 298 U.S. 238, 297, this Court said:

> "We first inquire, then—What is commerce? The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say, from the points of view as to what it includes and what it excludes. • • • As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. • • • "

The power granted by the states to the federal Government through the Constitution in the Commerce clause was the power to regulate the economic and commercial transactions of the citizens of the various states. The activities of the federal Government in prosecuting war are authorized by the Constitution outside of and apart from the Commerce clause.

The acquisition and construction of Louisiana Ordnance Plant and the production of military explosives at that facility by the United States of America were accomplished for the sole purpose of successfully prosecuting the war in the defense of this nation. The sole output of this Government-owned facility was in munitions of war. This Court has given a broad definition to the term "military property for military use." Cf. *Northern Pac. Ry. Co.* v. *United States*, 330 U.S. 248. The manufacture of munitions of war at Louisiana Ordnance Plant lacked all the characteristics of commerce implied in the Constitution. They were not made to be sold, were not to be sold, and were not sold. The Government did not expect and will not gain a profit thereby. In a global war such products were not produced for any commercial purpose and therefore were not the subjects of commerce as that term is used in the Fair Labor Standards Act of 1938.

The Fair Labor Standards Act of 1938 purports to be a regulation of interstate commerce and its constitutionality was sustained on the ground that the enactment of the Act was a proper exercise of the commerce power granted to the federal Government by the United States Constitution. *United States* v. *Darby Lumber Company*, 312 U.S. 100. In enacting the Fair Labor Standards Act, the Congress had in mind that definition of "commerce" urged above. In the Declaration of Policy set forth in Section 2(a) of the Act, the Congress made a finding that there existed certain evils "*in industry* engaged in commerce or in the production of goods for commerce." (Emphasis supplied.) In this Declaration of Policy, Congress found that *in*

industry engaged in commerce or the production of goods for commerce, certain detrimental labor conditions existed which, among other things, "burdens commerce", "constitutes an unfair *method of competition* in commerce" and "interferes with orderly and fair *marketing of goods* in commerce." (Emphasis supplied.) These findings were not directed at nor are they applicable to the production or transportation by the United States Government of Government-owned munitions for the use of armed forces in the time of war. The waging of war by the Government is not an industrial pursuit. It cannot create unfair methods of competition and it involves no marketing of goods. Whatever meaning may be given to the term "commerce" of the Constitution, it is clear that the Congress in enacting the Fair Labor Standards Act did not intend and did not have in mind the production of munitions of war by the federal Government in its own plants either through Government employees or through the instrumentality of outside agencies, acting in its sovereign capacity in the defense of the national interest.

One District Court has succinctly summarized this entire argument:

> "Prosecution of a war is not commerce. War is the negation of commerce. Often the purpose of a war and the result, usually, is to impair or destroy commerce, not to carry it on." *Divins* v. *Haseltine Electronics Corp.*, 70 F. Supp. 686, 689 (S.D. N.Y.)

Some courts have observed that the transportation by the federal Government of its own property across state lines to the armed forces is a type of transportation included in the definition of "commerce" in Sec. 3(b) of the Act.[1] This interpretation of the word "transportation" is unwarranted. The United States, by the terms of the Act, is excluded from the provisions thereof. Further, it is well

[1] *Clyde* v. *Broderick*, 144 F.(2d) 348 (C.C.A. 10th); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N.W.(2d) 258; *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28 (S.D. Iowa.)

established that statutes of general terms do not apply to the United States without express words to that effect. *United States* v. *United Mine Workers of America*, 330 U.S. 258. All that Congress intended by the insertion of the word "transportation" in the definition of "commerce" was to include those employees under the coverage of the Act who were engaged in the physical activity of moving the goods across state lines as contrasted with those employees who were engaged in producing the goods to be moved across state lines. The fact that an article crossed the state line is not conclusive of its being an article of commerce or of its being in interstate commerce. Certainly articles in the personal possession of the owner which crossed state lines with him are not goods in commerce even though there is a clear transportation thereof. Thus, baseball players who travel from state to state taking their paraphernalia with them are not engaged in interstate commerce and their employers or owners are not engaged in interstate business. As Mr. Justice Holmes said, speaking for this Court, "the transport is a mere incident, not the essential thing." *Federal Club* v. *National League*, 259 U.S. 200, 209.

The transportation by the United States of America of its munitions of war to the battlefronts was a mere incident to the purpose for which they were produced. They could serve no useful purpose stock-piled in this country. The transportation of the munitions of war by the United States has no bearing on the question of the coverage of the Act in this case. Cf. *N.L.R.A.* v. *Idaho-Maryland M. Corp.*, 98 F.(2d) 129, 131 (C.C.A. 9th).

The production of the munitions of war at the Louisiana Ordnance Plant and the transportation of such munitions of war to the battlefronts was not "commerce" as such term is used in the Constitution, or more particularly, as used in the Fair Labor Standards Act of 1938, and therefore, the Petitioners were not engaged in commerce or the production of goods for commerce.

II.

A COST-PLUS-A-FIXED-FEE CONTRACTOR MANUFACTURING MUNITIONS OF WAR FOR THE UNITED STATES OF AMERICA OPERATES UNDER THE IMMUNITY PROVIDED FOR THE SOVEREIGN IN THE FAIR LABOR STANDARDS ACT.

In executing the task assigned to him, the cost-plus-a-fixed-fee contractor is an instrumentality of the United States. One who contracts with the Government on that basis is engaged under the strictest form of control and supervision and at no risk to himself, when operating within the provisions of the contract, to render services for the United States. He is reimbursed for every item of legitimate cost. The essence of the transaction is that for an agreed fee the Government employs his technical, managerial and organizational abilities. The Congress in authorizing the Secretary of War to operate and maintain adequate military facilities for national defense purposes directed him to do so "either by means of Government personnel or through the *agency* of selected, qualified commercial manufacturers under contracts entered into with them."[3] (Emphasis supplied). The use of the term "agency" by the Congress was by design and not by accident. The Secretary of War was already empowered to make purchases in the open market from the normal sources of supply. To avoid the evils of a "cost-plus" contract and to restrict the imposition of unnecessary costs upon the Government, the Secretary of War determined to enter into a new type of contractual relationship in which the Secretary of War or his duly authorized representatives should exercise continuous and complete control over the activities of the operating contractor. The record in this case, and particularly the copy of the operating contract herein, reflects the extent of that control. Clearly the Government officers had the power of absolute control

[3] Act of July 2, 1940, (Public No. 703, 76th Cong.) 54 Stat. 712, 50 U.S.C. App. Sec. 1171.

over all the details of performance. It is not necessary to determine that the contractor in this case was an agent of the Government for all purposes, but it is sufficiently clear that the contractor here in the manufacture of munitions of war was acting for and on behalf of the United States in its sovereign capacity. As such, it was an instrumentality of the United States and enjoyed the sovereign immunity which the United States of America, acting in its governmental capacity, as contrasted with its proprietary capacity, enjoys from all regulatory statutes and from which it is expressly excluded in the Fair Labor Standards Act.

From its inherent nature, the United States of America, as the sovereign, must of necessity operate through agents. "Departments" are the sole form of agency mentioned in the Constitution[4] and were almost the sole form of agency created by Congress prior to the movement for the establishment of "independent" agencies. For more than 100 years, however, corporations have been used as agencies for doing the work of the Government. Congress may create them "as appropriate means of executing the powers of government." *Keifer & Keifer* v. *R.F.C.*, 306 U.S. 381, 389. It would serve no useful purpose to catalog all of the different judicially recognized instrumentalities or agencies of the United States of America.[5] This much is clear—there is no difference in the effective control of a corporation, whether it be by stock ownership or by the

[4] U.S. Const., Art. II, Sec. 2.

[5] The following have been held to be instrumentalities of the United States, although their organization and ownership have varied: The Panama Railroad Co., *New York ex rel Rogers* v. *Graves*, 299 U.S. 401; The Tennessee Valley Authority, *Pierce* v. *U.S.*, 314 U.S. 306; The United States Shipping Board Emergency Fleet Corp., *Sloan Shipyards* v. *U.S. Fleet Corp.*, 258 U.S. 549; Home Owners' Loan Corp., *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21; Army Post Exchanges, *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481.

provisions of a contract, in determining whether such corporation is an instrumentality of the United States.

The case of *Alabama* v. *King & Boozer*, 314 U.S. 1, is sometimes cited for the proposition that a cost-plus-a-fixed-fee contractor is not an instrumentality of the United States of America and therefore does not enjoy sovereign immunity. Such reliance arises from an obvious misunderstanding of the decision in that case. All that was decided there was that a state tax imposed upon a vendor might be passed on to the purchaser in connection with contracts of sale made in its own name by a cost-plus-a-fixed-fee contractor engaged in constructing a War Department facility. This case is merely another decision in the long line of cases which attempt to determine when a state can and when it cannot tax an instrumentality of the federal Government. This Court has recently said that such "line of taxability is somewhat irregular and has varied through the years." *S.R.A. Inc.* v. *Minnesota*, 327 U.S. 558, 562.

The Court did not say in *Alabama* v. *King & Boozer*, *supra*, that a cost-plus-a-fixed-fee contractor was not an instrumentality of the federal Government, and language to this effect can be found nowhere in the opinion. What the Court did say was "but however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government *to enter into contracts or to pledge its credit.*" (Emphasis supplied). It is a normal practice to restrict the authority of an agent to the end that he cannot pledge his principal's credit. This Court has recognized that its decision in *Alabama* v. *King & Boozer* was limited to the question of immunity from state taxation to the specific facts before it. *United States* v. *Allegheny County*, 322 U.S. 174.

In his memorandum requesting that certiorari be granted herein, the Solicitor General has designated the Respondent as an "independent contractor." Even if the Respondent

were designated as an "independent contractor" by the terms of the operating contract in effect at Louisiana Ordnance Plant, such designation does not determine the issue. This Court has recently held that "putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722. In so holding, the Court has rightly determined that the relationship does not depend upon isolated factors but rather upon the circumstances of the whole activity. Cf. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111. Certainly this rule works both ways. If a worker can show that he is an employee rather than an independent contractor, then an alleged employer has the same right to show that he is an agent or instrumentality of the Government rather than an independent contractor, as he is sometimes labeled by his contract with the Government, for the purposes of avoiding the Fair Labor Standards Act.

From "the circumstances of the whole activity", it appears clear that the cost-plus-a-fixed-fee contractor herein was acting as an instrumentality of the United States of America in the manufacture of munitions of war at Louisiana Ordnance Plant. By express terms the United States is excluded from the definition of "employer" as defined by Section 3(d) of the Act. Such exclusion would, of course, include any agency or instrumentality of the United States. One court in analyzing comparable situations has urged that there is no reason why the United States and its employees should not be subject to the provisions of the Fair Labor Standards Act.* Such observation ignores the plain language of the Act. The United States Government and its employees were expressly excluded from the regulatory provisions of the Fair Labor Standards Act for the reason that the federal Government has full control of the hours of work, the rates of pay, and the working conditions of its employees and it needs no

* *Bell* v. *Porter*, 159 F.(2d) 117, 119 (C.C.A. 7th)

general legislative mandate to observe fair labor standards. By contract provisions it can exercise the same control over those persons who contract with it.

To hold that the cost-plus-a-fixed-fee contractor in the case at bar was an instrumentality of the United States and, as such, excluded from the provisions of the Fair Labor Standards Act, it is not necessary to determine that the employees of the contractor are employees of the Government for all purposes. This Court has recently said that "the question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the federal Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of Governmental employer and employee." *United States v. United Mine Workers of America*, 330 U.S. 258. The employees involved in the *United Mine Workers* case were originally employees of the private owners of the mines which had been seized by the Government under the War Labor Disputes Act. The Government permitted and required the mine managers to continue the operation and in nearly every respect there was no variation in the manner of operating the mines before and after the seizure by the Government. If the employees of private contractors become employees of the federal Government for the purposes of the War Labor Disputes Act upon seizure of the mines by the Government, then employees of a cost-plus-a-fixed-fee contractor operating a Government-owned Ordnance facility under the broad power of control of the United States are employees of the United States to the extent that they are not covered by the provisions of the Fair Labor Standards Act.

The Government regulated the hours of work and the rates of pay of such employees, it had the authority to fire them, and it paid their wages and salaries indirectly through the instrumentality of the cost-plus-a-fixed-fee

contractor. The only factor lacking in this employer-employee relationship was that the employee's name did not appear directly on the Government payrolls. This Court has recognized that employees need not be directly employed by the United States or any state or political subdivision of a state to exclude them from the coverage of the Fair Labor Standards Act. Cf. *Creekmore* v. *Public Belt R.R.*, 134 F.(2d) 576 (C.C.A. 5th); Certiorari denied, 320 U.S. 742.

The control which the United States reserved and exercised over the operation of Louisiana Ordnance Plant effectively made the cost-plus-a-fixed-fee contractor herein an instrumentality of the United States in the manufacture of munitions of war. As such instrumentality, the cost-plus-a-fixed-fee contractor was excluded from the regulatory provisions of the Fair Labor Standards Act and its employees were not covered by the Act.

III.

THE MUNITIONS OF WAR PROCESSED AT LOUISIANA ORDNANCE PLANT WERE NOT "GOODS" WITHIN THE MEANING OF SECTION 3(i) OF THE FAIR LABOR STANDARDS ACT.

The Fair Labor Standards Act is concerned with goods which are articles or subjects of commerce and which are in the stream of commerce and not in the hands of the ultimate consumer thereof. Section 3(i) of the Act defines goods as follows:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.'"[1]

[1] 52 Stat. 1060, 29 U.S.C., Sec. 203 (i).

It is earnestly submitted that the "shells, grenades, mines, fuses and bombs and other products" which were processed at Louisiana Ordnance Plant were not "articles or subjects of commerce" within the meaning of "goods" as defined in the Fair Labor Standards Act. They normally have no commercial value or market since they serve no commercial function. It is unlawful to export such materials without a license.[8] As the Court below aptly pointed out, these munitions "never at any time went into or became a part of commerce as defined in the Fair Labor Standards Act. They were not manufactured for sale, nor were they ever intended or used for commercial purposes". 164 F.(2d) 1016, at 1017. In so holding the Circuit Court has pointed up the realities of the situation for there were no goods produced at Louisiana Ordnance Plant as Congress intended the term "goods" to include in enacting the Fair Labor Standards Act.

Apart from the fact that the shells, grenades, mines, fuses and bombs lack the essential characteristics of "goods" as that term is defined by the Act, neither the Petitioners nor the Respondent in this case were engaged in the production of goods for commerce because of the exclusionary clause contained in the definition of "goods". Section 3(i) does not include goods "after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." There can be no serious dispute that the United States was the ultimate consumer of the munitions of war dealt with at Louisiana Ordnance Plant. During all the times when the contractor had anything to do with these munitions of war, they were in the actual physical possession of the United States. The operating contract provided that the title to all materials should vest in

[8] Act of November 4, 1939, c. 2, Sec. 12, 54 Stat. 10, as amended January 26, 1942, c. 19, 56 Stat. 1922 U.S.C. 452; July 26, 1947, c. 343, Title II, Sec. 205(a), 61 Stat. —, Presidential Proclamation 2776 of March 27, 1948, 13 F. R. 1623.

the United States upon the arrival at the plant site or at some approved place off the plant site as determined by the Contracting Officer's Representative. Much of the materials were furnished to the Louisiana Ordnance Plant by the United States as government, or "free issue," materials. The Contracting Officer's Representative had the full custody, control and responsibility of all material, equipment or other property on the plant site. The contractor in this case had no dealings with the munitions of war or their essential ingredients or component parts until *after* such materials and component parts had come into the actual physical possession of the United States of America. There is a sharp distinction here from the normal situation where a war contractor might procure his raw materials from any source, fabricate his goods and then sell and deliver them to the United States. In the instant case, the cost-plus-a-fixed-fee contractor was solely performing services with respect to material already in the hands of the ultimate consumer. The Court below was correct in its conclusion when it said:

> "On the other hand, if the defendant was not an agency or instrumentality of the United States, and if the munitions were articles of commerce within the contemplation of the Act, and if the United States was not the producer of the munitions, and if the subparagraph (d) of Sec. 3 of the Act, excluding the United States from its operation, is not applicable; then there would seem to be no escape from the conclusion that since the finished products and all their ingredients are the property of the United States and delivered to it as the ultimate consumer of the goods, the Act, under subparagraph (i) of Sec. 3, would still be inapplicable because the term 'goods' 'does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof.'"

The Second Circuit Court of Appeals has reached the same conclusion in a substantially similar situation. *Divins* v. *Hazeltine Electronics Corp.*, 163 F.(2d) 100, at 104 (C.C.A. 2d).

Since the shells, grenades, mines, fuses, bombs and other products dealt in at Louisiana Ordnance Plant were not "goods" within the definition of the Fair Labor Standards Act, then neither the Petitioners nor the Respondent were engaged in the production of goods for commerce in the operation of that facility.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,
J. R. L. JOHNSON, JR.
ROBERT A. FULWILER, JR.
Counsel